

*In the Matter of Mark Leonard, Deputy Police Chief (PM3619F),  
Township of Bloomfield*  
DOP Docket No. 2005-4876  
**(Merit System Board, decided January 25, 2006)**

Mark Leonard, a Police Captain with the Township of Bloomfield, represented by Robert C. Scrivo, Esq., appeals the cancellation of the February 28, 2005 certification of the eligible list for Deputy Police Chief (PM3619F), Township of Bloomfield.

By way of background, Department of Personnel (DOP) records indicate that the examination for Deputy Police Chief (PM3619F) was announced with a closing date of September 21, 2004. Four applicants applied for and were admitted to the subject examination which was held on December 8, 2004. The eligible list of two names, including the appellant, promulgated on February 24, 2005 and expires on February 23, 2008. A certification of two names was issued on February 28, 2005. However, on April 22, 2005, the appointing authority requested that the certification be cancelled as it had eliminated the position of Deputy Police Chief due to a reorganization which was approved by the Township Council on January 24, 2005.

On appeal to the Merit System Board (Board), the appellant requests that the cancellation of the certification be reversed and that he be appointed to the position of Deputy Police Chief.<sup>1</sup> Initially, he maintains that Police Chief Michael Sisco cancelled the certification in retaliation for the appellant's questioning of how Sisco could be appointed to the title of Police Chief since Sisco had not taken an examination for either the Deputy Police Chief or Police Chief title. Moreover, the appellant contends that he took one year to prepare for the Deputy Police Chief examination, thereby taking time away from his family. Additionally, the appellant asserts that Sisco vacated the position of Deputy Police Chief without properly notifying the DOP. Specifically, he contends that the position of Deputy Police Chief was listed in the township budget and that the appointing authority violated its rules and regulations by failing to amend the table of organization for the Police Department. The appellant argues that based on the foregoing, he is now "in a position where [he has] to prove that [he is] eligible for a position that [he] tested for" and scored number one for and is therefore entitled to the appointment.

The appellant also asserts that since the DOP improperly cancelled the certification, his appointment is mandated pursuant to *N.J.A.C. 4A:10-2.2(a)*,

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<sup>1</sup> The appellant notes that the Township Code lists "one Deputy Chief" position within the Police Department, pursuant to a July 7, 2003 ordinance.

which provides that once the examination process has been initiated, “the appointing authority shall make an appointment from a resulting complete certification.” Moreover, the appellant maintains that the appointing authority failed to properly petition the Commissioner of the DOP for a waiver of appointment. *See N.J.A.C. 4A:10-2.2*. In the alternative, the appellant maintains that even if the appointing authority had petitioned for a waiver of appointment, such a petition is not automatically granted as it requires that an appointing authority provide a valid reason for the waiver, which he claims the appointing authority failed to do in the instant matter. In this regard, the appellant maintains that the appointing authority’s stated reason to cancel the certification, *i.e.*, the reorganization, reveals its “prejudice against [the appellant] in attempting to undo his lawful right to the Deputy [Police] Chief’s position after it initiated the examination process.” Furthermore, the appellant argues that since the Township Council voted on vacating the position in January 2005, the appointing authority’s failure to ask for a cancellation of the February 28, 2005 certification until April 22, 2005 was untimely and therefore the cancellation is void.

Additionally, the appellant maintains that the reorganization of the department removed the title of Deputy Police Chief and “created [five] new positions and promoted [eight] officers very quickly to get to [Sisco’s] son Michael Sisco, Jr., who [was] promoted to Sergeant through nepotism.” Moreover, the appellant disputes that the vacating of the position of Deputy Police Chief and the creation of several lower level supervisory positions will save the taxpayers. Rather, he asserts that it will cost the taxpayers an additional \$93,677, based on a comparison of the salary of the Deputy Police Chief and the salaries of the additional lower level supervisory staff. However, the appellant’s calculations do not take into consideration the overtime the appointing authority previously paid to its lower level supervisory staff. The appellant also claims that the Police Department does not yet have 24/7 coverage, as Sisco stated would occur with the reorganization.

The appellant maintains that the failure to offer the Police Chief examination<sup>2</sup> to individuals in the title of Police Captain was unconstitutional since there is a strong preference for promotional examinations. *See N.J.S.A. 11A:4-2*. In this regard, the appellant notes that pursuant to *N.J.A.C. 4A:4-2.4(a)*, a promotional examination shall be open to either the next lower in-series title, the next two lower in-series titles, or to all applicants in the unit scope who meet the open competitive examination

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<sup>2</sup> The promotional examination for Police Chief (PM3646F), Township of Bloomfield was announced with a closing date of November 30, 2004 and was open to individuals who possessed one year of continuous permanent service as of the closing date in the title of Deputy Police Chief.

requirements. Therefore, since a complete list of three candidates could not have been obtained from the next lower in-series title (Deputy Police Chief), the DOP was required to open the promotional examination to the title of Police Captain. As a result, the appellant argues that since he was denied his “right to take the Police Chief” examination, the DOP must re-issue the announcement for the Police Chief examination and allow all appropriate candidates an opportunity to sit for the examination.

Furthermore, the appellant argues that the waiver of examination for Sisco for the position of Police Chief was improperly given by the DOP. Specifically, he maintains that the appointing authority could not prove all four factors listed in *N.J.A.C. 4A:4-2.7*. *N.J.A.C. 4A:4-2.7(a)* provides that a waiver of competitive examination may be given if: 1) the employee has been successfully tested in the basic skills; 2) the employee has not failed a promotional examination within one year prior to the announced closing date; 3) the number of interested eligibles does not exceed the number of promotional appointments by more than two; and 4) veterans preference rights are not a factor. The appellant maintains that since there were four Police Captains, including himself, who were interested in the position of Police Chief, the appointing authority failed to meet the third factor. Moreover, the appellant argues that although Sisco had not failed an examination within one year of the announcement, Sisco had not taken a test in over 17 years. Therefore, the appellant argues that *N.J.A.C. 4A:4-2.7(a)2* “should serve to quash the waiver granted to Sisco.” The appellant also maintains that DOP Assistant Commissioner Robin Andujar related “his reservations of Sisco becoming [Police Chief] without testing in the last 20 years.” Consequently, the appellant maintains that he is entitled to take the examination for Police Chief.

In response, the appointing authority, represented by J. Andrew Kinsey, Esq., asserts that although it sympathizes with the appellant, its decision not to fill a position had nothing to do with the appellant, and instead, it had to with its:

. . . prerogative and legitimate management desire to reorganize the police department’s table of organization by providing for fewer highly paid top level executive officers and more lower paid middle/low level officers.

The appointing authority asserts that the reorganization allows it to pursue such priorities as improving communications, grant writing and other initiatives designed to improve economy and efficiency. For example, it maintains that the reorganization allows it to provide 24/7 supervisory desk coverage, which it had previously been unable to provide and for which it had

received complaints. The appointing authority asserts that by deciding not to fill the Deputy Police Chief position, it was able to “free-up” money in the budget to create additional lower-level positions, which would lower overtime costs. In this regard, the appointing authority notes that in its January 24, 2005 Township Council session, the Council unanimously approved the reorganization of the police department to vacate the two Deputy Police Chief positions and have six Police Captain, nine Police Lieutenant and twenty Police Sergeant positions<sup>3</sup> as a way to increase supervisory presence and to decrease overtime and other costs.

Additionally, the appointing authority asserts that pursuant to *N.J.A.C. 4A:4-4.2(c)2i*, when fewer than three interested eligibles are certified, the appointing authority may either make a permanent appointment, make a provisional appointment or vacate the position/title. Therefore, its decision to vacate the position of Deputy Police Chief was within its legal authority. In this regard, it notes that the subject eligible list only contained the names of the appellant and Steven Flanagan. Moreover, it notes that the March 7, 2005 certification notice sent to the appellant specifically states, “this is **not** a guarantee that you will be scheduled for an interview, nor is it a promise of employment” (emphasis in original). Furthermore, the appointing authority maintains that it was under no requirement to amend its table of organization prior to deciding not to fill the position. In this regard, it maintains that the decision to vacate the position of Deputy Police Chief is only one aspect of a larger decision to reorganize and that once the whole plan has been finalized, the table of organization will be amended.

Furthermore, the appointing authority argues that in *In the Matter of Deputy Fire Chief (PM3654F), Borough of Roselle* (MSB, decided March 23, 2005), the Board determined that “the decision to hold an examination does not remove from [an appointing authority] its management prerogative to fill vacancies since it is not required to utilize the resulting eligible list for [a] position . . . unless it has a vacancy it wants to fill.” Moreover, in *Donovan v. Board of Commissioners of City of Bayonne*, 12 *N.J. Misc.* 792, 794 (1934), the Supreme Court determined that it is a governing body’s right to abolish positions for reasons of economy.

The appointing authority also asserts that despite the appellant’s allegations, he has failed to provide any evidence that its decision to vacate the position of Deputy Police Chief was in retaliation for his questioning Sisco’s appointment to Police Chief. Moreover, it notes that the appellant also fails to provide any evidence that the decision to vacate the position of

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<sup>3</sup> DOP records reveal that there are currently 20 Police Sergeants, nine Police Lieutenants, six Police Captains and no Deputy Police Chiefs serving with the appointing authority.

Deputy Police Chief was so that Sisco could appoint his son to the position of Police Sergeant. Rather, it maintains that the appellant simply argues that his non-appointment to a title he was not entitled to is sufficient evidence of the appointing authority's bad faith. Furthermore, the appointing authority notes that the appellant has provided no arguments or evidence which establish that Sisco or his son were not qualified for their respective positions.

With regard to the appellant's allegations concerning the waiver of appointment for Sisco, the appointing authority notes that a promotion upon waiver of competitive examination is a perfectly acceptable manner of promotion. See *N.J.A.C.* 4A:4-2.7. Moreover, it asserts that Sisco met all of the criteria for a waiver of appointment. In particular, the appointing authority notes that pursuant to a June 15, 1998 memorandum, DOP determined that individuals who had previously been successfully tested for the title of Police Captain could be granted a waiver of examination to the titles of Inspector, Deputy Police Chief and/or Police Chief.

It is noted that DOP records reveal that on May 31, 2001, a waiver of examination was granted for the Deputy Police Chief (PM3514C), Township of Bloomfield examination for Michael Sisco and Frank Guarneri. DOP records also reveal that Guarneri and Sisco were provisionally appointed to the title of Deputy Police Chief effective November 20, 2000, and Guarneri retired effective July 1, 2003. On January 12, 2005, a waiver of examination for the title of Police Chief (PM3646F), Township of Bloomfield was granted for Michael Sisco.

DOP records also reveal that Michael Sisco, Jr., ranked fourth on the eligible list for Police Sergeant (PM2532E), Bloomfield. The first four ranked eligibles, including Sisco, Jr., were certified to the appointing authority on January 26, 2005 and all were appointed, effective February 7, 2005.

## **CONCLUSION**

In accordance with *N.J.S.A.* 11A:4-5, once the examination process has been initiated due to the appointment of a provisional employee or due to an appointing authority's request for a list to fill a vacancy, the appointing authority must make an appointment from the resulting eligible list if there are three or more interested and eligible candidates. However, pursuant to *N.J.A.C.* 4A:4-4.2(c)2i, when fewer than three interested eligibles are certified, the appointing authority may either: make a permanent appointment; make a provisional appointment from the list; make a provisional appointment of another qualified person if no eligible on the list is interested; or vacate the position/title.

In the instant matter, the February 28, 2005 certification for Deputy Police Chief (PM3619F), was not a *complete* certification since it only contained the names of the appellant and one other eligible. Therefore, the appointing authority was not required to request a waiver of appointment. Rather, *N.J.A.C.* 4A:4-4.2(c)2i specifically states that when there is an incomplete certification, an appointing authority may vacate the position/title. Moreover, in *In the Matter of Deputy Fire Chief (PM3654F), Borough of Roselle, supra*, the Board stated that the decision as to whether to fill a vacancy is a management prerogative. Consequently, the cancellation of the certification was appropriate.

Additionally, the Board does not agree with the appellant that the mere fact that he studied and ranked number one on the certification entitles him to an appointment to the title of Deputy Police Chief. Placement on an eligible list does not provide an eligible with a vested property interest in employment. Rather, the only interest that results from placement on an eligible list is that a candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 *N.J. Super.* 494 (App. Div. 1990). Moreover, the Board notes that the certification contained the names of two eligibles. Therefore, even if the certification had not been cancelled, the appointing authority could have appointed either of the two listed eligibles.

With regard to the appellant's allegations concerning the waiver of examination for the title of Police Chief for Sisco, the Board initially notes that the appellant is incorrect that he was eligible for the examination for Police Chief (PM3646F), Township of Bloomfield. Specifically, the Board notes that the Police Chief (PM3646F) examination was *only* open to individuals who were permanently serving in the title of Deputy Police Chief. Therefore, since the appellant was not in the title of Deputy Police Chief at the time of the examination, he did not meet the announced the eligibility requirements. The Board also does not agree with the appellant's claim that, pursuant to *N.J.A.C.* 4A:4-2.4(a), the examination should have been open to individuals in the titles of Deputy Police Chief and Police Captain. *N.J.A.C.* 4A:4-2.4(a) provides that if a title which is the subject of a promotional examination is part of a title series, then the examination shall be open to **one** of the following:

- 1) The next lower in-series title used in the local jurisdiction;
- 2) The next two lower in-series titles used in the local jurisdiction; or

- 3) All applicants in the unit scope who meet the open competitive requirements and all applicants in the next lower or next two lower in-series titles used in the local jurisdiction.

Although *N.J.A.C.* 4A:4-2.4(a) allows a promotional examination to be open to the next two lower in-series titles, it does not *require* it to be. Consequently, the examination for Police Chief was correctly open to the next lower in-series title, Deputy Police Chief.

Furthermore, with regard to the appellant's allegation that the waiver of examination for the Police Chief examination was improperly granted, it is initially noted that since the appellant was not eligible for the Police Chief examination, he does not have standing to challenge the waiver of examination granted to Sisco for the title of Police Chief. However, notwithstanding the foregoing, the waiver of examination for Sisco was properly granted. *N.J.A.C.* 4A:4-2.7(a) provides that the Commissioner may authorize the promotion of a qualified permanent employee in the competitive division of the career service by regular appointment without competitive examination if:

- 1) The employee has been successfully tested in the basic skills required for the promotional title;
- 2) The employee has not failed, within one year prior to the announced closing date, a promotional examination for that title. However, an employee who subsequently passed an examination for that title shall be eligible for promotion.
- 3) The number of interested eligibles does not exceed the number of promotional appointments by more than two; and
- 4) Veterans preference rights are not a factor.

The New Jersey Supreme Court has upheld the waiver of an examination through the predecessor rule to *N.J.A.C.* 4A:4-2.7 as being within the lawful discretion of the Department of Personnel (DOP). See *Pringle v. Department of Civil Service*, 45 *N.J.* 329 (1965) and *Falcey v. Civil Service Commission*, 16 *N.J.* 117 (1954). In *Pringle*, the Court, in a footnote, suggested that the subject rule should indicate that the way to determine whether a candidate had been tested successfully in the basic skills for the title was if the candidate had previously taken and passed an examination for the basic skills required in the position to which he was being promoted. A test administered by the DOP ensures that a consistent standard is applied as there is no way to ensure consistency in the evaluation of employees serving in supervisory and managerial titles. In 1998, a review of the job analyses for

Police Sergeant, Police Lieutenant, Police Captain, Inspector, Deputy Police Chief and Police Chief titles, disclosed that there were distinct differences in the basic skills required for some of these titles. Thus, it was determined that the basic skills were different among the following promotional title groups: 1) Police Sergeant; 2) Police Lieutenant/Police Captain; 3) Police Captain, Inspector, Deputy Police Chief and Police Chief. The review determined a uniqueness of the Police Captain title because it includes basic skills found in Lieutenant/Captain and Captain, Inspector, Deputy Chief and Chief title groups. Additionally, certain areas covered in the Police Chief examination (criminal law, police administration, police management, and community relations), were not included in the testing for Lieutenant.

In the instant matter, the record reveals that Sisco met all of the requirements listed in *N.J.A.C. 4A:4-2.7* for a waiver of an examination. In particular, Sisco was successfully tested in the basic skills, *i.e.*, he had passed the Police Captain examination, and he had not failed a promotional examination within a year. Although the appellant maintains that since Sisco had taken the Police Captain's examination over 17 years previously, it should not be used to satisfy the requirements of *N.J.A.C. 4A:4-2.7(a)1* and *N.J.A.C. 4A:4-2.7(a)2*, the Board notes *N.J.A.C. 4A:4-2.7* does not indicate that the test had to be within a certain number of years. Rather, the only time limit noted is that an individual could not have failed a promotional examination within one year. Therefore, since Sisco had successfully passed the Police Captain examination and had not failed a promotional examination within one year, he clearly met those requirements. Moreover, as discussed above, Sisco was the only individual eligible for the Police Chief examination and veterans preference rights were not at issue. Consequently, the waiver of appointment was appropriately granted to Sisco at that time.<sup>4</sup>

## **ORDER**

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

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<sup>4</sup> It is noted that effective December 29, 2005, the DOP issued a new policy for police and fire promotional announcements which will prohibit an employee from being promoted two consecutive times through the examination waiver process. For example, an individual who passes the Police Captain examination could waive into a Deputy Police Chief title. However, that same individual would not then be granted a waiver of examination for the Police Chief title. Rather, the individual would have to take the Police Chief examination.